85-944

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN C. BROOKS,
Commissioner of Labor of the
State of North Carolina,
Appellant,

v.

BURLINGTON INDUSTRIES, INC., *ET AL.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

I. Whether the provisions of an employer's personnel policy or employee handbook, under which employees are promised severance benefits, constitute an "employee benefit plan" within the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, so as to preempt statutory actions for the recovery of such benefits under state law?*

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*This same question has been raised in the appeals to this Court from the Second Circuit of *Irving Gilbert, et al. v. Burlington Industries, Inc.*, No. 85-441, and *Lillian Roberts, as Commissioner of Labor of the State of New York v. Burlington Industries, Inc.*, No. 85-460. This Court has invited the Solicitor General to file a brief in those cases expressing the view of the United States.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the United States Court of Appeals for the Fourth Circuit were:

Bill N. Slack; Jimmy W. Aheron; Carol Aldridge; Pamila B. Apple; Carole Baggett; Thomas F. Bowden; Walter Brom; Nellie B. Burwell; Elizabeth S. Canada; Gary L. Carter; Irene Chandler; James J. Clifford; Linda S. Coble; James A. Crawford; Ruth Dixon; Octavia M. Driver; Edmund Foster; Richard C. Foy; Peggy A. Gerringer; Deville Goodman; Ada R. Griffin; Delanor M. Hamby; Mildred R. Hester; Evelyn H. Hilton; Peggy W. Hodge; Mary E. Hope; Joseph J. Houston; Don Huffman; Jeff Hughes; Yvonnie B. James; Melvin E. King; Norma M. Loy; Sara Copeland Maness; Linda Mooneyham; Cora N. Moore; Virginia M. Moore; Robert C. Moricle; Edna M. Murray; Faye F. Neese; Gladys J. Oakley; Patricia G. Page; Daniel E. Perry; Barbara P. Petty; P. Douglas Pierce; Betty Hornaday Ray; Ruth S. Rich; Mary Darlene Rierson; Fred Brewer Roberts; Ida B. Saul; William A. Seelman; Sylvia R. Shoc; Gladys H. Shore; Frances Simmons; Mary Foust Stansell; Peggy P. Stone; Sherman C. Summers; Frances B. Sykes; Barbara D. Thompson; Ronald F. Tyree; Hazel P. Walker; Mary Lou Whitfield; Rita P. Whitley; Sandra F. Wilson; Brownie A. Wright; Elsie B. Young; Bettie J. Boswell; Debbie M. Rascoe; Lemmer Sherdina Sellars; Jack T. Sullivan; Claude O. Anders; Eva Barr; Margaret Brindle; Hoyt Cheek, Sr.; Hubert Foltz; Clyde Jarrell; Robert Martin; Thelma Martin; Leslie Morehead; Gerald Moretz; Alice Nelson; Carolyn Rayfield; Daisy Rickey; Ethel Royal; Larry Wright; William K. Anders; Merilla L. Barrier; Diane L. Boehm; Henry M. Brown; Hilda K. Cox; Stephen E. Elmore, Jr.; Richard L. Hall; William Jones; Paul M. King; Robert E. May; William Robert Oman;

Cecil A. Poff; John W. Quick; Clifton Smith; Mary Smith; J. Clay Stiles, III; Bobby S. Tew; Thurma A. Chriscoe; Roy F. Williamson; Betty Albright; Nadine Albright; Boyce J. Asbill; Doris S. Baughan; Larry C. Beane; Melodye Snow Beard; Susan Beasley; Robert N. Blevins; Karen L. Boling; Wanda Bowman; Linda B. Brady; Linda P. Bristow; David Brittain; Marcella Jo Brittain; Mary R. Bullard; Betty S. Byrd; Charles H. Byrd; George M. Byrum; Charles F. Cagle, Jr.; Claude R. Cagle; Ann J. Campbell; Joe J. Cassett; Kimberly Spoon Coats; Garland J. Cole; George C. Cole; Ted Cooley; Clara M. Cox; Phyllis Ingold Cox; Cindy M. Cranford; Tommy L. Cranford; Curtis L. Craven; Jackie Nall Davis; Wayne L. Duggins; Nancy M. Ellison; Herman A. Flynt; Cecil C. Gatlin; Earl Glover; Willard E. Gordon; Rayford B. Grant; James L. Hammer; Donald L. Harshaw; Larry Lee Highsmith; Tommy W. Hill; Kathryn Jeanette Hogan; Carroll D. Hoyle; Sandra Hunsucker; Katherine R. James; Linda Jordan Kennedy; Coy A. Kiser; Marilyn Hewitt Knight; Robert N. W. Knott; Gaynell H. Ledwall; Marguerite M. Lineberry; Shelby L. Logsdon; Marlene B. Lucas; Barbara S. Miller; Juanita K. Moody; Grace H. McNeill; Robert F. McWilliams; Susan B. Pack; Cathy D. Powers; Betty M. Reeves; Van E. Rich; Edwin L. Ridge; Harry Rose; Carol L. Savchak; Lenora C. Shaw; James W. Slaughter; Bobby N. Smith; Mike S. Smith; Imogene N. Snider; John W. Snider; Mary Edith Spoon; Jean A. Stafford; Mozelle A. Stout; Harriett W. Summey; Brenda S. Thomas; Gerald D. Thomas; Frances Freeman Tilley; Hazel S. Bullock; Eurika Plummer; Terriel E. Wessinger, Jr.; Walter G. Williamson; James L. Wilson, Jr.; Mildred C. York; Faye T. Yow; Brian

Dale Manuel; Raymond Claude Evans; A. Gene Heidel; Brenda B. Herndon; Russell W. Herndon; Virginia H. Schulte; Sandra G. Walker; Sharon G. Warren; Shirley W. Welch; and Roger Downs,

Plaintiffs-Appellants, †

and

John C. Brooks, Commissioner of Labor of the State of North Carolina,

Plaintiff-Intervenor-Appellant,

v.

Burlington Industries, Inc.; Calvin A. Michaels; Charles A. McLendon; and Humberto L. Quintana,

Defendants-Appellees.

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†The caption of this case on appeal to this Court does not contain the names of the individual plaintiffs who were also appellants in the United States Court of Appeals for the Fourth Circuit. They are seeking review by filing a separate petition for writ of certiorari in this Court.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The United States Court of Appeals for the Fourth Circuit rendered its decision and entered judgment on September 3, 1985. A copy of the Court's opinion is set out in Appendix A. The memorandum opinion and judgment of the United States District Court for the Middle District of North Carolina, Greensboro Division, were rendered on October 17, 1984. A copy of the opinion is set out in Appendix B, and a copy of the judgment is contained in Appendix C.

JURISDICTION

This is a civil action by 200 former employees of Burlington Industries, Inc. (hereinafter "Burlington"), to recover

promised severance pay. After filing complaints with the Wage and Hour Division of the North Carolina Department of Labor and a final determination by that agency that Burlington was in violation of the Wage and Hour Act by failing to pay severance pay, the former Burlington employees brought suit in the Superior Court of Alamance County, North Carolina. The plaintiffs-appellants stated five claims for relief under state statutory and common law, including a claim based on Burlington's failure to pay severance pay in violation of N.C.G.S. § 95-25.7 of the Wage and Hour Act. John C. Brooks, Commissioner of Labor of the State of North Carolina (hereinafter "Commissioner"), moved to intervene in support of the plaintiffs' claim under the Wage and Hour Act. Defendant Burlington filed a petition removing the action to the United States District Court alleging that the claims of the plaintiffs arose under the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (hereinafter "ERISA"), and that the state law claims were preempted. Subsequently, the District Court entered an order allowing the Commissioner to intervene. In addition, the District Court allowed plaintiffs to amend their complaint to set forth additional and alternative claims for relief arising under ERISA and to join three company executives as defendants. Federal jurisdiction over the ERISA claims was predicated on federal question jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e) and (f); pendant jurisdiction was asserted with respect to the state law claims.

The United States Court of Appeals for the Fourth Circuit held that N.C.G.S. § 95-25.7 of the Wage and Hour Act was preempted by federal law and entered judgment on September 3, 1985. Plaintiffs-appellants' ERISA claims were also dismissed. No party sought a rehearing. The Commissioner filed a timely notice of appeal in the Court of Appeals on October 15, 1985, a copy of which is contained in Appendix D. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(2).

STATUTES AND REGULATIONS INVOLVED

Relevant portions of ERISA, 29 U.S.C. § 1001 *et seq.*, the North Carolina Wage and Hour Act, and regulations promulgated by the United States Secretary of Labor are set out in Appendix E.

STATEMENT OF THE CASE

1. Material Facts

The plaintiffs in this cause of action are all former salaried employees of the Burlington Socks and Hosiery Divisions who were employed in defendant's North Carolina plant and office locations.[1] Effective January 3, 1982, Burlington sold the Socks and Hosiery Divisions to Kayser-Roth Corporation as on-going concerns and plaintiffs were terminated from Burlington's payroll. In order to enhance the sale of these divisions by insuring that its employees would accept employment with Kayser-Roth, Burlington agreed to use its best efforts to encourage all salaried and wage employees to become Kayser-Roth employees. This included an agreement by Burlington that no employee of the Socks and Hosiery Divisions could be rehired by Burlington for a period of six months after the sale. Subsequently, the plaintiffs were employed by Kayser-Roth, in most cases in jobs similar to the jobs which they held at Burlington. Many of the plaintiffs also worked in the same locations. However, most of the employees from the J. Spencer Love facility were transferred to a Kayser-Roth facility approximately 22 miles away. This required an additional 44 miles of travel by these employees to and from work.

Since at least 1953, Burlington has had a policy of

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[1]Other Socks and Hosiery Division employees within the United States were located in Tennessee and New York. The New York merchandising employees are plaintiffs in the case of *Irving Gilbert, et al. v. Burlington Industries, Inc.*, which is on appeal to this Court from the Second Circuit, No. 85-441.

paying severance pay to employees who are involuntarily terminated from employment with the company. At the time of the sale, the severance policy appeared in a Company Policy Manual which was only distributed to management personnel, but was available to most employees on request.[2] The policy was disseminated to all salaried

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[2]At the time of the sale, the Company Policy Manual read in pertinent part:

I. *Company Policy*

A. *General*—The Company makes payroll severance payments and vacation severance payments to eligible salaried employees who are terminated from the Company.

B. *Payments*—Payroll severance payments are based upon tables contained in this policy. . . .

II. *Application of Policy*

A. *Payroll Severance*—All regular full-time salaried employees who meet eligibility requirements are paid payroll severance based upon continuous service as shown in Exhibit A or Exhibit B.

1. *Eligibility*—Employees are eligible to receive payroll severance if they are regular full-time salaried employees who are involuntarily terminated from the Company. Eligibility requirements are:

a. *Job Elimination*—This category consists of terminations due to circumstances such as elimination or modification of operations or other job elimination due to bona fide organizational changes.

b. *Other Involuntary Terminations*—These are terminations due to unsatisfactory job performance which is not willful. . . .

2. *Ineligibility*—Employees are not eligible to receive payroll severance if:

a. *Temporary Full-Time, Temporary Part-Time Employees*—Employees assigned to these employment classifications are not eligible for payroll severance payments.

b. *Ineligible Full-Time Employees*—Employees who are terminated because of early retirement, mandatory retirement, death, misbehavior, lack of cooperation, willful negligence, or other unfriendly acts against the Company or towards its management are not eligible for payroll severance payments.

ployees, beginning in 1976, in the Salaried Employees' Handbook.[3]

Shortly before the sale to Kayser-Roth, Burlington announced to its Socks and Hosiery employees that severance pay would not be paid since Kayser-Roth would be employing them. Employees who did not accept employment offered by Kayser-Roth also would not be paid severance pay.

The shocked and disillusioned employees complained to the Wage and Hour Division of the North Carolina Department of Labor concerning Burlington's decision not to pay severance. The Wage and Hour Division began its investigation of Burlington's severance pay practices before the sale to Kayser-Roth took place, and a Wage and Hour Compliance Officer informed Burlington of his preliminary determination that the severance pay was due to the employees pursuant to the North Carolina Wage and Hour Act, N.C.G.S. § 95-25.1 *et seq.* After the sale took place, the investigation was completed and a final determination was reached by the Director of the Wage and Hour Division that Burlington was in violation of N.C.G.S. § 95-25.7,

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[3] The Salaried Employees Handbook effective at the time of the sale contained the following provision:

> SEVERANCE PAY.
>
> The Company provides severance pay to full-time employees who involuntarily leave the Company. Pay ranges from two weeks to twelve weeks, based on the employee's age and length of continuous service with the Company. Fraud or other behavior deemed to be willful could disqualify an employee from receiving severance benefits.

for failure to pay all wages due upon termination.[4]

Burlington's severance pay policy was administered by Burlington through its personnel and payroll departments, and was actually designated as "payroll severance." The amount of severance paid to salaried employees was set forth in payment schedules based on age and length of service with Burlington. It was automatically paid in periodic installments by Burlington following termination of employment and according to the employee's normal pay schedule. Severance pay was treated like wages, with all legal withholding deductions such as income tax and social security tax. Severance payments were made out of Burlington's general assets. The company did not segregate any assets from which to pay severance pay and it maintained no fund, trust or separate account from which severance payments were made. An employee receiving severance pay would continue to receive severance pay even if he obtained employment with a company other than Burlington. The Company Policy Manual provided that the periodic severance payments would terminate only if the employee was re-employed by Burlington.[5] Since the

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[4] N.C.G.S. § 95-25.7 reads in pertinent part as follows:

> *Payment to separated employees.*—Employees whose employment is discontinued for any reason shall be paid all wages due on or before the next regular payday.

N.C.G.S. § 95-25.2(16) defines wages in pertinent part as follows:

> For the purposes of G.S. 95-25.6 through G.S. 95-25.12, "wage" includes sick pay, vacation pay, severance pay, commissions, bonuses, and other amounts promised when the employer has a policy or a practice of making such payments.

[5] The Policy Manual provided at the bottom of the payment schedule:

> No severance pay is paid beyond age 70, beyond the monthly pay period in which death occurs, and upon re-employment *by the company.*

(Emphasis added.)

manual did not preclude severance pay for re-employment by another firm, Burlington's severance pay policy was not a form of unemployment insurance.

Prior to the sale of the Socks and Hosiery Divisions, Burlington never treated its severance policy as being governed by ERISA and never complied with ERISA's formal reporting and disclosure requirements. Burlington held no assets in trust and did not appoint any trustees to manage the policy. Nor did Burlington designate a fiduciary for the policy, publish or file an annual report, a financial statement, or a plan description, as required by ERISA. During the investigation and administrative proceedings leading up to the final determination by the North Carolina Wage and Hour Division, Burlington never interposed ERISA as a defense to the Division's determination and no claim of preemption was made.

2. Proceedings in the Court Below

The individual plaintiffs commenced this action to recover severance pay by filing a complaint on February 24, 1983, in the Superior Court of Alamance County, North Carolina. The complaint filed in State Court alleged claims for severance pay based on the common law of contracts, the North Carolina Wage and Hour Act, and damages for violation of the North Carolina Unfair or Deceptive Trade Practices Act. On March 17, 1983, John C. Brooks, Commissioner of Labor of the State of North Carolina filed a motion seeking permission to intervene in the action in support of the plaintiffs' claims under the Wage and Hour Act. On March 28, 1983, Burlington filed a petition removing the action to the United States District Court alleging that the claims of the plaintiffs arose under ERISA.

On April 22, 1983, the District Court entered an order allowing the motion to intervene by the Commissioner. On June 16, 1983, the plaintiffs filed a motion to amend their complaint to set forth additional and alternative claims for

relief arising under ERISA and to join three individual defendants, all executives of Burlington. This motion was subsequently allowed. On July 29, 1983, the plaintiffs filed a motion for preliminary injunction seeking to enjoin Burlington from refusing to consider the plaintiffs for re-employment because of their participation in this lawsuit.

On April 23, 1984, Burlington filed a motion for summary judgment claiming that the state law causes of action were preempted by ERISA and that it was entitled to summary judgment on the ERISA cause of action. On that same date, the Commissioner filed a motion to dismiss for lack of federal jurisdiction and to remand the case to the State Court. The plaintiffs filed a motion for partial summary judgment.

The Commissioner moved to dismiss all claims predicated on ERISA on the grounds that the severance pay policy promulgated by Burlington is not a "plan" under the terms of ERISA. If Burlington's promise to pay severance is not a plan within the ambit of ERISA, the Commissioner argued, there is no federal question and no jurisdiction in the District Court. Furthermore, claims pursuant to the North Carolina Wage and Hour Act would not be preempted. The Commissioner argued to the District Court that both the legislative history and the statutory scheme of ERISA demonstrate that the Act was not intended to regulate mere employer promises to employees which are paid out of general assets. He further argued that to be regulated by ERISA, the plan must have a trust, structure or identity which is separate and distinct from the employer and must meet the formal requirements of the Act. The Commissioner also relied on a U.S. Department of Labor regulation which excluded from ERISA's coverage employer payroll or compensation practices where payments were made to employees directly from the employer or from general assets of the employer.

On October 17, 1984, the District Court issued a decision

and order granting Burlington's motion for summary judgment on the state law causes of action and also on the ERISA causes of action.[6] The court denied the Commissioner's motion to dismiss, holding simply that the U.S. Secretary of Labor treats severance benefits as an employee welfare benefit plan and other courts have consistently held that severance pay benefits were employee welfare benefit plans under ERISA. The District Court also concluded that ERISA's funding requirements do not apply to employee welfare benefit plans such as a severance pay benefit, but did not address the question of whether an ERISA plan must have an existence or identity of its own which is more than a promise or agreement to pay benefits. Nor did the District Court grapple with the Secretary's regulation that distinguishes the payment of certain benefits from welfare benefit plans, even though those same benefits are listed in ERISA's definition of an employee welfare benefit plan. After the District Court entered its judgment dismissing the action, notices of appeal to the Fourth Circuit Court of Appeals were filed by the Commissioner of Labor and the plaintiffs.

On September 3, 1985, the Court of Appeals affirmed the District Court. The court held that Burlington's severance pay policy is an employee welfare benefit plan subject to ERISA and that ERISA preempts the state law claims asserted in this case. The court rejected the argument of the Commissioner and the *amici*[7] that a mere promise or agreement to pay severance, without more, does not constitute a welfare benefit plan within the meaning of ERISA.

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[6] Plaintiffs in this action are filing a petition for writ of certiorari in this Court asserting error by the District Court and the Fourth Circuit Court of Appeals in granting defendants' motion for summary judgment and thereby denying and dismissing plaintiffs' federal and state law claims. *Bill N. Slack, et al. v. Burlington Industries, Inc., et al.*, No. 84-2241(L) (4th Cir. September 3, 1985).

[7] The Commissioner was joined on the appeal by officials from ten states and the District of Columbia who filed a brief as *amici curiae*.

The court did not consider whether there was direct contract liability by the employer based on the severance pay agreement between the employer and its employees which is enforceable under state law. The court also rejected the Commissioner's arguments that the legislative history and statutory language dictate that before an ERISA plan can be found, there must be a funded trust or some cognizable entity separate and apart from the employer. The court further rejected the Commissioner's reliance on the regulation of the U.S. Department of Labor which distinguished benefits provided to employees as payroll practices from the same enumerated benefits referred to in ERISA's definition of a welfare benefit plan.[8]

REASONS THIS COURT SHOULD GRANT PLENARY CONSIDERATION OF THE SUBSTANTIAL QUESTION PRESENTED BY THIS APPEAL

This appeal presents to the Court a heretofore unanswered question of great importance to millions of employers and employees and to all fifty states: When does an employer's promise to pay a benefit mentioned in ERISA constitute an ERISA employee welfare benefit plan? In other words, what is the definition of "plan, fund, or program" as used in ERISA's definition of "welfare benefit plan"?

In reaching its decision that ERISA preempts North Carolina's Wage and Hour Act as a state law which relates to an employee welfare benefit plan, the court below concluded that Burlington's bare promise to give severance

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[8]The Commissioner also contended in both the District Court and the Court of Appeals that, even if Burlington's severance policy was subject to ERISA, the North Carolina Wage and Hour Act was not preempted because it does not regulate the terms and conditions of the plan, but simply enforces payment of compensation promised by an employer. The Commissioner also argued that the Wage and Hour Act is implicitly exempted from ERISA's preemption as a valid exercise of the State's police power under the Tenth Amendment. The Commissioner does not raise these issues in this appeal.

pay out of its general assets constitutes a welfare benefit plan. The court concluded that the promise of an ERISA-type benefit is necessarily a plan subject to ERISA regulation. The United States Secretary of Labor, on the other hand, has recognized through regulations that not all promises by an employer to give benefits listed in ERISA constitute welfare benefit plans. Indeed, several examples of such non-plan promises are listed in those regulations. The Secretary's regulations, however, do not attempt to define the precise dividing line between employer policies which do and do not establish plans. Thus, the task of giving a more precise definition of "welfare benefit plan" was left to the judicial branch and is now presented to this Court.

In that not every employer policy offering ERISA-type benefits is a "plan, fund or program" regulated by ERISA, it is of great moment to have a clear statement by this Court as to just what ERISA means by those terms. The majority of states, including North Carolina, have wage payment collection laws which enforce the payment of many of the same benefits listed in ERISA. The states' right to continue enforcing these laws depends on the extent to which employer promises to pay benefits do not constitute ERISA employee benefit plans, since ERISA preempts state laws which relate to ERISA plans. Millions of employees will be affected by this definition, because state laws provide them with a more favorable legal framework and better administrative assistance for collecting unpaid benefits. Likewise, employers have great interest in this question. Depending upon the definition of "plan" given by this Court, millions of employers may be required to comply with the complex filing and fiduciary requirements of ERISA in instances where they now believe that their bare promises of benefits do not trigger such requirements.

The question presented to the Court is one of statutory interpretation. Both the provisions of ERISA and the legislative history suggest that Congress intended ERISA to regulate benefit plans which are entities separate and apart

from the employers who establish them and which are either funded or capable of being funded. Congress surveyed all state and federal laws in existence at the time of ERISA's enactment which purported to regulate the benefit arrangements which concerned them and found those laws lacking. Specifically, Congress considered state trust laws and found them inadequate to regulate all the various types of entities that employers had created for the provision of benefits. On the other hand, Congress never mentioned any wage payment collection laws in its review of relevant laws. With the pervasive presence of these wage collection laws, Congress could not possibly have overlooked them. Instead, the only tenable assumption is that Congress did not consider these laws relevant to the benefit arrangements ERISA was to regulate. Insofar as state wage collection laws and state common laws of contract were already providing an adequate means to employees to enforce bare employer promises to pay benefits from general assets, Congress clearly intended to limit ERISA's regulatory scope to plans which are separate entities from the employer and which have or could have assets of their own.

A previous decision of this Court supports the correctness of distinguishing benefit plans as separate entities regulated by ERISA from employer promises to give benefits which are not so regulated. Moreover, the Third Circuit Court of Appeals has followed this Court's precedent and has produced a line of decisions conflicting with the decision on appeal here from the Fourth Circuit.

As the foregoing demonstrate, there is both a significant need and a substantial basis for this Court to define employee welfare benefit plan, as encompassed by ERISA, in a more precise and narrow manner than did the court below.

I. The Commissioner Presents The Substantial Question Whether A Promise Or Agreement To Pay Severance, Without More, Does Not Constitute A Welfare Benefit Plan Within The Meaning Of ERISA.

Congress enacted ERISA in an effort to protect employees whose pensions, annuities, retirement and other benefits were tied up in and dependent upon complex plans about which they knew little or nothing, and some of which were fraudulently or negligently mismanaged and subject to haphazard regulation. It sought to regulate pension plans and, to a lesser extent, other types of benefit plans, in order to help insure employees a modicum of security in the expectation of benefits. As Congress declared, "the continued well-being and security of millions of employees and their dependents are directly affected by these plans . . . , that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries . . . that disclosure be made and safeguards be provided . . . ." 29 U.S.C. § 1001(a).

In the instant case, whether Burlington's practice of granting severance pay is a "plan" governed by the provisions of ERISA is a threshold question. If it is not a plan within the ambit of ERISA, then North Carolina's statutory and common law are not superseded or preempted and the provisions of ERISA do not affect or have application to plaintiffs' right to recover. The court below erred in concluding that Burlington's promise to pay severance pay is an "employee welfare benefit plan" subject to ERISA.

A. Not Every Promise by an Employer to Pay Benefits Listed in ERISA Constitutes a Welfare Benefit Plan.

The court below concluded that severance pay is a benefit listed in the definition of welfare benefit plan, but it never answered the question of whether every promise to pay severance benefits constitutes a welfare benefit plan regulated by ERISA. The Secretary of Labor, on the other hand, has adopted regulations demonstrating that even though an employer has promised to pay a benefit listed in ERISA, it is also necessary to ascertain whether a benefit

plan exists before determining coverage by ERISA. When vacation pay, holiday pay, sick pay and similar wage-related benefits are paid by the employer from its general assets, the Secretary has concluded that those benefits are provided by means of payroll practices rather than as part of a benefit plan. *See,* 29 C.F.R. 2510.3-1(b). This regulation implicitly, if not explicitly, recognizes that the mere promise of the listed benefits by an employer falls short of establishing a welfare benefit plan. While this regulation has been questioned, it has been upheld as a reasonable administrative interpretation due deference by the courts. *See, e.g., California Hospital Association v. Henning,* Nos. 83-6381 & 83-6416 (9th Cir. September 6, 1985);[9] *National Metalcrafters v. McNeil,* 602 F. Supp. 232 (N.D. Ill., 1985). The regulation, however, stops short of giving a precise definition of welfare benefit plan under ERISA. Thus, the Secretary states "this section should not be read as implicitly indicating the Department's views on the possible scope of section 3(1) [of ERISA]." The substantial question raised by this appeal but, by the Secretary's candid admission, left open by his regulations, is a precise definition of "welfare benefit plan."

B. An ERISA Plan Must Have an Identity of Its Own

The question left unanswered by the Secretary's regulations and now presented to this Court is one of statutory

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[9] In the *Henning* decision, the Ninth Circuit held that an employer's promise to give vacation pay from its general assets constituted a payroll practice under the Secretary's regulation rather than a welfare benefit plan under ERISA. The Ninth Circuit currently has under consideration a motion for rehearing of its decision. Regardless of the ultimate outcome of that case, it appears that the losing party will likely appeal to this Court raising an issue similar to the one presented in this appeal, namely, when is an employer's promise to pay a benefit listed in ERISA not an employee welfare benefit plan.

interpretation. Section 3(1) of ERISA, 29 U.S.C. § 1002(1), defines an "employee welfare benefit plan" or "welfare plan" as:

> [A]ny plan, fund or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in § 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

Few courts have grappled with interpreting § 3(1) of ERISA, but it is clear from the definition itself that an ERISA covered welfare plan must be (1) a plan, fund, or program, (2) established or maintained, (3) by an employer or by an employee organization, or both, (4) for the purpose of providing the benefits enumerated in § 1002(1)(A) or described in § 302(c) of the Labor Management Relations Act ("LMRA"), (5) to participants. *See, Donovan v. Dillingham,* 688 F.2d 1367 (11th Cir. 1982). However, although it is clear on its face that the statute covers any plan, fund or program, the terms "plan" and "program" are not defined in the statute. Therefore, it is necessary to look at the structure of ERISA's regulating provisions and the intent of Congress to distinguish a welfare benefit "plan" covered by ERISA from mere benefits.

The statutory scheme for ERISA demonstrates that Congress contemplated that a "plan" under ERISA would have

a structure giving it an identity of its own separate and apart from the employer. Sections 1102(a) and (b) of the Act suggest what features must be present before a plan can be said to exist, such as a written instrument which (1) names a fiduciary, (2) provides a procedure for establishing and carrying out a funding policy, (3) allocates responsibility among those who will operate and administer the plan, (4) establishes procedures for amending the plan, (5) identifies the persons who will have the authority to amend, and (6) specifies the basis on which payments will be made to and from the plan. Under 29 U.S.C. § 1022, a plan administrator is required to file a "plan description" with the United States Department of Labor and to distribute a summary of that plan description to participants and beneficiaries. ERISA also requires the plan administrator to publish and file an annual report for the plan. 29 U.S.C. § 1023 and 1024. Additionally, employers must establish and maintain procedures for the timely handling and disposition of day-to-day benefit claims including an understandable written notice setting forth the specific reasons for denial of a claim and a full and prompt fair review of the denial. 29 U.S.C. § 1133.

In addition to the mechanics of establishing a plan, ERISA defines the terms "welfare plan" and "employer" as separate entities. Compare 29 U.S.C. § 1002(1), which provides that the "terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program . . . established or maintained by an employer . . . ," with 29 U.S.C. § 1002(5), which provides that "the term 'employer' means any person acting directly as an employer, or indirectly in the interest of an employer, *in relation to an employee benefit plan* . . . ." (Emphasis added.) Although they may exist in relationship to one another, the plan and the employer that established it are separate entities and each must have an identity of its own. *See also,* 29 U.S.C. § 1132(d)(1) ("an employee benefit plan may sue or be sued . . . as an entity"); 29 U.S.C. § 1132(d)(2) ([a]ny money judgment . . . against an employee benefit plan shall

be enforceable only against the plan as an entity and shall not be enforceable against any other person"); 29 U.S.C. §§ 1106(a) and 1107 (wherein it is assumed that a plan and the employer that established it are separate entities and, on the basis of that assumption, certain transactions between them are prohibited.

The language of the statute and the legislative history clearly demonstrate that for a "plan" as defined by ERISA to exist, the "plan" must either have a source of financing independent from the general assets of the employer or commit itself to establishing a funding policy that will assure that an adequate proportion of the employer's income will be dedicated to the plan.[10] ERISA's legislative history and the Act's formal name clearly demonstrate that its drafters were principally concerned with controlling the kinds of abuses typical of funded pension plans. The purpose of ERISA was to regulate a relatively modern economic institution which, in the years following World War II, had experienced phenomenal expansion. H.R. Rep. No. 93-533, 93rd Cong., 1st Sess. 2-3, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4640-41. Several years of hearings and studies by Congress revealed substantial problems in the area of pension plan vesting, funding and fiduciary conduct. "The assets of private plans, estimated to be in excess of $150 billion, constitute the only large private *accumulation* of funds which have escaped the imprimatur of effective federal regulation." H.R. Rep. No. 93-533, 93rd Cong., 1st Sess. 3, *reprinted in* 1974 U.S. Code Cong. & Admin. News, p. 4641. (Emphasis added.) With respect to these plans, participants were left to rely upon the state common law of trusts, which Congress

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[10] In its *amicus curiae* brief in the case of *California Hospital Association, et al. v. Patrick W. Henning, etc., supra,* the Solicitor of Labor submitted that the existence of a separate fund with plan assets is both the critical factor and a reasonable basis for distinguishing ERISA covered plans from payroll practices that provide benefits paid from an employer's general assets.

found inadequate. Congress' concern was clearly not directed at employer personnel policies, employment contracts and employer compensation practices, which were hardly recent phenomenon and which had been for years effectively regulated and enforced by state wage payment statutes and common law contract principles. In fact, in its review of all state and federal laws which regulated the plans to be addressed by ERISA, Congress made not a single reference to the ubiquitous presence of the states' common law of contracts or their wage payment collection laws. Certainly some mention of these laws would have been made had Congress been concerned with the types of employer promises of benefits already successfully regulated by these state laws. Since Congress set out merely to control abuses of pension vesting, funding and fiduciary abuses, an overly-expansive reading of the term "benefit plan" to include all unfunded severance agreements, generally involving smaller amounts of money, would result in a gross distortion of Congress' purpose.

The foregoing analysis clearly indicates that ERISA and Congress contemplated a creature quite different from Burlington's severance pay policy which is funded out of its general assets and which had none of the formal documents and structure required for an employer welfare benefit plan subject to ERISA plan. It is hardly credible to argue that Burlington's policy was a "plan" within ERISA where none of the characteristics of an ERISA plan are found. Burlington's severance pay policy is nothing more than the employer's agreement to pay severance wages as part of an employer's overall compensation and is not a "plan" covered by ERISA.

Further, this Court has recognized the distinction between an employer that sponsors a plan and the separate entity of the plan itself in the case of *Nachman Corporation v. Pension Benefit Guaranty Corporation,* 446 U.S. 359, 100 S. Ct. 1723, 64 L. Ed. 2d 354 (1980). In *Nachman,* it was determined that while a liability disclaimer clause

disclaimed any assumption of direct contractual liability by the employer to pay the unfunded portion of certain benefits, it did not make the employees' right to those benefits conditional as against the plan itself. The opinion contemplates that an employer can either choose not to establish a plan, in which case it can also choose whether or not to obligate itself to pay benefits out of its general assets, or, alternatively, it can choose to establish a plan and either assume or not assume direct liability for any deficiencies in plan assets. In either case, the extent to which the employer is *directly* liable to its employees is a question to be decided in accordance with the terms of the contract into which it has entered.

The *Nachman* analysis leads to four conclusions: (1) there is a meaningful distinction between "employers" and "plans"; (2) for an "employee welfare benefit plan" to be established or maintained within the meaning of the Act, it must be so constituted as to have an identity and character of its own, as distinct from that of the employer; and (3) to the extent that an employee seeks to enforce his rights as against a "plan," he must do so under ERISA, *see* 29 U.S.C. §§ 1132 and 1144(a); but (4) to the extent that he seeks to enforce any rights directly against his employer, his cause of action lies in contract. Hence, recovery of promised severance pay or other benefits from an employer, as opposed to recovery from a "plan," is not preempted by ERISA. Statutory and common law remedies remain viable and should not have been dismissed by the court below. Where an employer contracts to make certain payments or provide certain benefits out of its general assets, it is directly liable to make those payments and provide those benefits to its employees, and its employees are entitled to enforce that liability directly against the employer—in contract or under a state wage and benefit enforcement statute.

C. To Qualify as a Severance Pay Employee Benefit Plan Within the Meaning of ERISA, the Plan Must Be Funded.

To qualify as an "employee welfare benefit plan," 29 U.S.C. § 1002(1)(B) requires that the plan, fund, or program have as its purpose the provision of any benefits described in Section 302(c) of the LMRA, 29 U.S.C. § 186(c). This section of the LMRA or Taft-Hartley Act, entitled "Restrictions of payments to employee representatives," outlaws any payment or loan, with the exception of payments to certain trust funds, by management to union representatives, and was designed to prohibit all forms of extortion and bribery in labor-management relations. The incorporated section refers to:

> money or other things of value paid by any employer to a *trust fund* established by such representative for the purpose of *pooled* vacation, holiday, *severance* or similar benefits, or defraying costs of apprenticeship or other training programs . . . .

29 U.S.C. § 186(c)(6) (emphasis added).

In 29 C.F.R. § 2510.3-1(a)(3), the United States Department of Labor indicated that only paragraph (6) of § 302(c) of the LMRA describes benefits not already listed in § 1002(1)(A) of ERISA. He concluded that the benefits described in the LMRA but not in § 1002(1)(A) are " * * * holiday, severance or similar benefits." The effect of this section of the Act according to the Secretary is to include within the definition of "welfare plan" those plans which provide holiday and severance benefits, and benefits which are similar, for example, benefits which are in substance severance benefits, although not so characterized. The court below erroneously interpreted this regulation to mean that any employer arrangement or promise to offer these benefits is an ERISA welfare benefit plan. The same regulation, however, later distinguishes payroll practices through which an employer offers these benefits as not constituting

an ERISA plan. *See,* 29 C.F.R. § 2510.3-1(b). Thus, the regulation relied on by the court merely lists benefits which are properly the subject of an ERISA plan, rather than defines what is a plan.

Furthermore, the clear statutory language of the LMRA which has been specifically incorporated into ERISA provides that a *trust fund* established for the purpose of *severance* benefits is a welfare plan under ERISA. Therefore, to qualify as a welfare plan under ERISA, a plan to provide severance benefits must have been established as a trust fund. The cross-reference to the Taft-Hartley Act suggests that Congress sought to specifically include all historically regulated plans, including certain traditionally *funded* plans negotiated in accordance with that statutory scheme.[11]

The court below also erred in relying on the 1980 amendments to ERISA to bolster its conclusion that a mere promise to pay severance is a welfare benefit plan. These amendments authorized the Secretary of Labor to issue regulations making a distinction between severance welfare benefit plans and pension plans. 29 U.S.C. § 1002(2)(B). This 1980 amendment was necessary because of confusion that could arise with regard to severance pay and pension plans pursuant to the language of 29 U.S.C. § 1002(2). Because pension plans were broadly defined to include retirement income, or any other payment of income which

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[11] In its *amicus curiae* brief in the case of *California Hospital Association, et al. v. Patrick W. Henning, etc., supra,* this is precisely the argument advanced by the Solicitor of Labor, who stated that the Act's cross-reference to the Taft-Hartley Act suggests that Congress merely sought to include all historically regulated plans, including traditionally funded vacation and holiday plans negotiated in accordance with that statute.

may not be so denominated but which is in substance retirement income, it was arguable that severance pay policies, which traditionally provide for the payment of income after an employee's termination date, might be confused with pension plans for purposes of ERISA.[12]

The Secretary of Labor had promulgated regulations in 1975 and in 1979 clarifying the common understanding that severance pay is not a form of pension benefits. *See,* 29 C.F.R. § 2510.3-2. The Secretary explained 29 C.F.R. § 2510.3-2, by indicating that a severance pay plan that is not a pension plan *may,* but is not required to be an employee welfare benefit plan.[13]

Although the legislative history of this amendment is sparse, it does appear that Congress agreed with the actions of the Secretary in differentiating between severance payments and pension plans and exempting severance pay from the stringent pension fund requirements. However, the regulation implicitly approved by Congress in 1980, recognized that a severance pay program which is not a pension plan *may,* but is not necessarily required to be a welfare benefit plan. Thus, in retroactively authorizing the Secretary's rules, there is no indication in the legislative history that Congress addressed the question as to whether all severance pay policies are in fact welfare benefit plans.

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[12] The designation as a pension plan under ERISA is particularly significant because of the additional and stringent requirements for vesting and funding which apply to "pension plans," *see,* 29 U.S.C. §§ 1053 and 1082, but which do not apply to "employee welfare benefit plans," *see,* 29 U.S.C. §§ 1051(1) and 1081(a)(1).

[13] The Secretary's commentary explained the regulation in part as follows:

> Finally, the Department is taking this opportunity to point out that a severance pay plan which meets the conditions of the regulations and thus is not a pension plan under section 3(2) of ERISA, *may* nonetheless constitute an employee welfare benefit plan under section 3(1) of ERISA.

44 Fed. Reg. 11763 (March 2, 1979).

In originally enacting ERISA, Congress very carefully distinguished severance pay plans under the LMRA from other named benefits. The 1980 amendments to ERISA and their legislative history do not in any way vitiate the original intent by Congress to include only funded severance pay arrangements within the meaning of ERISA. Hence, benefits which are formally denominated as severance pay, but which have features which make them pension benefits in substance are subject to ERISA's stringent vesting and funding requirements for pension plans. However, absent the indicia of a pension plan, the question still remains as to whether a severance pay arrangement is a welfare benefit plan or merely a direct employer promise outside the scope of ERISA.

II. This Court Should Grant Plenary Consideration On Appeal Because The Questions Presented Are Of Great Importance To Virtually All States And To Millions Of Persons Employed In Those States.

The resolution of the issues presented in this case has far reaching consequences affecting virtually all, if not all, states. Forty-six (46) states and the District of Columbia have statutes which require payment of wages, similar to the North Carolina statute which was held below to be preempted. Of these forty-seven (47) jurisdictions, thirty-one (31) enforce payment of promised severance pay under their wage collection statutes. Moreover, in nearly all, if not all, fifty states, promised severance payments are enforceable under each state's common law of contracts, which was also held below to be preempted.

The issue of preemption of these state laws and statutes is significant for several qualitative reasons beyond the sheer quantitative effect of voiding so many state laws. First, the question is presented whether Congress intended ERISA to upset the traditional balance between state and federal enforcement of employee compensation. Other

federal laws regulating employee compensation do not seek to impose national uniformity through broad preemption provisions, but instead permit the states to provide more stringent protections if they wish. *See, e.g.*, the Fair Labor Standards Act, 29 U.S.C. § 218; the Age Discrimination in Employment Act, 29 U.S.C. § 633; and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000h–4. Partially in response to this encouragement and, in part, to reinforce and facilitate the common law mechanisms of employee compensation enforcement, the vast majority of states have adopted wage payment collection statutes. Thus, one of the significant issues brought before the Court is whether the numerous state regulatory schemes encouraged by Congress through other enactments which continue to exist are suddenly and decisively voided by ERISA.

Second, is the deleterious impact which ERISA preemption of state laws will have on the ability of millions of employees to collect their severance benefits. This impact results from both a loss of access to enforcement assistance under state laws and to the less onerous standard of conduct which applies to fiduciaries under ERISA than applies to employers under state laws. Each of the thirty–one jurisdictions having a statute enforcing promised severance pay provides administrative assistance to employees in substantiating and collecting their claimed benefits. Combined, these states and the District of Columbia maintain staffs of more than 1,000 persons to provide this assistance. Should the administrative assistance fail, eighteen of those thirty–one jurisdictions can seek criminal sanctions and twenty–one can file civil suit on behalf of employees against violating employers. Such assistance is critical to employees because in many instances the number of employees and the amount of money involved in a severance claim is so small that the cost to the employee of pursuing the claim on his own is prohibitive. These resources are either clearly lacking or greatly diminished for the employee in claims arising under ERISA.

There are no provisions in ERISA for criminal sanctions for nonpayment of benefits. Moreover, the administrative and litigation assistance offered by the United States Department of Labor under ERISA is substantially less, if it exists at all.[14]

Should the decision below be allowed to stand, not only will employees seeking to recover severance pay lose significant state assistance, but they will also have a more difficult standard of proof. In the case at bar, the Court of Appeals below held that Burlington's decision not to pay severance pay to its terminated employees was not arbitrary and capricious. Based on this standard, the plaintiffs-appellants were denied relief under ERISA[15] Under the state wage collection statute and common law contract theories, the employees need only show the employer's contractual obligation to pay the benefits sought and the breach of that promise. In fact, the North Carolina Department of Labor had determined that the Burlington employees were due severance pay under the North Carolina Wage and Hour Act.

The question of whether ERISA will decrease the likelihood that employees will recover promised severance pay is significant for several reasons. First, such a result is contrary to the stated Congressional intent in adopting ERISA to increase the protection for participants and bene-

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[14] For example, North Carolina has eighteen (18) compliance officers to investigate and resolve complaints of nonpayment of wages, including severance pay. By comparison, the Atlanta regional office of the Labor Management Services Administration, which among its other duties enforces ERISA, has ten (10) investigating officers to handle complaints in a four state area, including North Carolina. None of its investigators reside in North Carolina. By sheer remoteness, size of territory and lack of numbers, the federal staff cannot approximate the administrative assistance offered by the State of North Carolina.

[15] This issue will be raised by plaintiffs-appellants *Bill N. Slack, et al.*, in their petition to this Court for writ of certiorari.

ficiaries of employee plans. *See,* 29 U.S.C. § 1001, Findings and Declaration of Policy. Should this Court let stand the decision below, then ironically ERISA's application may well have the opposite effect of that intended by Congress in that employee protection will have actually decreased rather than increased as a result of ERISA.

Second, decreasing the likelihood that employees will receive their promised severance pay will adversely affect the states and their citizens. Protection of the financial and, hence, general wellbeing of wage earners and their families has been an area of significant state interest and action. If employees are not paid their severance wages when due, they and their families often suffer severe financial hardships. Many wage earners live on such tight budgets that the loss of just one paycheck can result in a family crisis. Rent goes unpaid, utilities are shut off, or sufficient amounts of food and other necessities are not affordable. States have a substantial interest in preventing such hardships by assuring prompt payment of all severance wages. When earned severance wages go unpaid and financial crises strike families, states often bear additional financial burdens through social service programs designed to protect the general welfare of the states' citizens. Unemployment benefits, general and special assistance, and other costly forms of social relief increase when earned wages go unpaid. These social programs cost the states and their taxpayers great sums of money. It is very much in the states' interest to minimize these expenses by enforcing payment of all severance wages earned.

III. The Court Should Grant Full Consideration On Appeal To Resolve A Conflict Between Circuit Courts Of Appeals

In the decision on appeal here, the Fourth Circuit Court of Appeals held that the preemption provision of ERISA precludes a lawsuit against an employer under state wage payment collection laws to enforce the employer's direct promise to make payments of benefits. The Third Circuit

Court of Appeals, on the other hand, in *Carpenters Health and Welfare Fund v. Kenneth R. Ambrose, Inc.*, 727 F.2d 279 (3rd Cir. 1983), held that the preemption provisions of ERISA do not preclude a lawsuit against an employer under a state wage payment collection law to enforce an employer's direct promise to make payments into an ERISA covered employee benefit plan. To the extent that one decision interprets ERISA to permit lawsuits under state law to enforce direct employer promises while the other does not, the decisions of these Circuits are in conflict, and it is appropriate for this Court to give full hearing to the present appeal in order to resolve that conflict.

In the *Ambrose* case, the Carpenters Health and Welfare Fund of Philadelphia and Vicinity (the "Fund") filed suit against Ken R. Ambrose, Inc. ("Ambrose, Inc.") to recover delinquent contributions owed to the Fund under a collective bargaining agreement. Recovery was sought under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a) (1976). A pendant state claim also sought to recover the contributions and to collect liquidated damages equal to 25% of the amount owed, as provided under the Pennsylvania Wage Payment Collection Law ("WPCL"), PA. STAT. ANN. tit. 43, § 260.1–.11 (Purdon Supp. 1983–84). The district court held Ambrose, Inc. liable both for the delinquent contributions under the LMRA and the WPCL and for the 25% liquidated damages under the WPCL. On appeal to the Third Circuit, Ambrose, Inc. argued that the WPCL was preempted by the LMRA and ERISA. The Court of Appeals dismissed this contention outright:

> The Ambroses also argue that the district court acted without jurisdiction on the WPCL claims and they further contend that the WPCL is preempted by the LMRA and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a) (1976), *amended by* the Multiemployer Pension Plan Amendment Act of 1980,

> 29 U.S.C. § 1145 (Supp. V–1981), we find that these contentions are without merit.

Carpenters Health and Welfare Fund v. Kenneth R. Ambrose, Inc., supra, 727 F.2d at 282, n.5. Thereafter, the Circuit Court upheld the district court's award of delinquent contributions and liquidated damages under the WPCL.

The Third Circuit does not state in its *Ambrose* opinion a rationale for rejecting ERISA preemption of the Pennsylvania WPCL. While this could be taken as a sign of a lightly considered decision, the better explanation would appear to be that the Third Circuit thought the question had been adequately considered and explained in its earlier decision in *Murphy v. Heppenstall Co.,* 635 F.2d 233 (3rd Cir. 1980), *cert. denied,* 454 U.S. 1152 (1982). In that case, retired employees sued their employer to recover the difference between pension payments guaranteed by the Pension Benefit Guaranty Corporation ("PBGC") and those provided for in a pension agreement which had resulted from collective bargaining. The United States District Court for the Western District of Pennsylvania granted partial summary judgment in favor of the plaintiff–retirees on the issue of liability and, on appeal under 28 U.S.C. § 1292(b), the Third Circuit affirmed.

In rejecting the defendant's argument that ERISA had preempted contract claims against an employer for sums in excess of those guaranteed by the PBGC, the Court construed *Nachman, supra,* as having, by negative implication affirmed the continuing vitality of direct contractual liability:

> [If *Nachman* stands for the proposition that an] employer may limit direct liability [and it does], direct liability must persist under ERISA. Otherwise *Nachman* would nonsensically permit restrictions on a form of liability the statute had precluded.

Murphy, supra, 635 F.2d at 239 (material in brackets added).

Not content to rely on *Nachman* alone, the court resorted to an examination of the statute itself to ascertain whether there was any inconsistency between the principle of direct contractual liability and the specific provisions and history of the Act. It concluded that there was no inconsistency:

> It is not inconsistent with the statutory scheme to permit employees to recover directly from the employer any additional benefits to which the employer has contractually obligated itself. While the effect of permitting that additional recovery may reduce the employer's net worth, and thus decrease the amount the PBGC may recover from the employer, the PBGC in its amicus brief to this court has taken a position supporting the employees' right to recover directly from the employer. Because nothing in ERISA, nor in its legislative history, nor in the views expressed by the government corporation charged with administering ERISA-guaranteed pension payments discountenances direct contractual recovery of pension benefits from the employer, we will affirm the district court's grant of summary judgment of liability in favor of the employees.

Murphy, supra, 635 F.2d at 239.

Taken together, the *Ambrose* and *Murphy* decisions stand for the proposition that "direct employer liability" is "direct employer liability" regardless of the existence of an ERISA benefit plan. Where an employer contracts to make certain payments or provide certain benefits out of its general assets, it is directly liable to make those payments and provide those benefits to its employees, and its employees are entitled to enforce that liability directly against the employer—in contract or under a state wage and benefit enforcement statute.

These pronouncements of the Third Circuit directly conflict with the decision below in the Fourth Circuit, which holds that attempts to enforce direct employer liability

under state law are precluded by ERISA's preemption of the state laws. Insofar as this conflict exists and will result in inconsistent application of federal law within the various circuits, this Court should exercise its authority to resolve the conflict by granting full consideration to this appeal.

CONCLUSION

For all of the foregoing reasons, this Court should summarily reverse the decision of the court below or grant plenary consideration of the significant question raised by appeal of the Commissioner of Labor of the State of North Carolina.

This the 2nd day of December, 1985.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of the foregoing JURISDICTIONAL STATEMENT of the Commissioner of Labor of the State of North Carolina, Plaintiff-Intervenor-Appellant, upon:

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This the 2nd day of December, 1985.

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